SUPREME COURT, U.S.
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No. 90-1609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARILYN GUERINOT, individually, and as representative of the Estate of Major THOMAS C. GUERINOT and as next of friend of TIMOTHY and JONATHAN GUERINOT, minors,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION and PRECISION SENSORS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On January 11, 1985, plaintiff, Marilyn Guerinot, filed a complaint for wrongful death in the United States District Court for the Southern District of Texas. [E.R.,

Ex. 1.][1] This was followed by the filing of a First Amended Complaint and Second Amended Complaint. [E.R., Ex. 2.]

In the latter complaint, Ms. Guerinot, acting individually and in her representative capacity, sought damages from defendant Rockwell International Corporation ("Rockwell") and defendant Precision Sensors, Inc.[2] ("PSI") resulting from the death of her husband, Major Thomas C. Guerinot, which occurred at Camp Pendleton, California. His death occurred on November 16, 1984, following the crash of an OV-10A aircraft. [*Id.*] On February 14, 1986, the suit was ordered transferred to the United States District Court for the Southern District of California. [C.R. 1.]

On September 9, 1988, all three parties filed motions for summary judgment or adjudication. Rockwell and PSI filed motions for summary judgment with respect to the entire complaint. [C.R. 49-52, 58-67.] Plaintiffs filed a motion for partial summary adjudication, seeking an order that the military contractor's defense was unavailable as a matter of law to either defendant. [C.R. 53-57.]

The motions were heard by the Honorable Howard B. Turrentine on March 6, 1989. On May 9, 1989, the

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[1] The abbreviation "E.R." refers to the "Appellants' Excerpts of Record" filed with the court of appeals. The abbreviation "C.R." refers to the "Clerk's Record." Where citations to the record are made, specific page and line references will often be given. For example, "C.R. 1, 3:5-6" refers to lines 5 and 6 of page 3 of document number 1. As a second example, "C.R. 52, Ex. 7, 12:20-15:14" refers to the material beginning at line 20 of page 12 through line 14 of page 15 of Exhibit 7 to document number 52.

[2] Pursuant to Supreme Court Rule 29.1, this respondent discloses that United Electric Controls Company is the corporate parent of Precision Sensors, Inc.

district court entered its order denying plaintiffs' motion and granting defendants' motions. [C.R. 89, and Appendix B to Petition for Writ of Certiorari.] Judgment in accordance with the order was entered on May 17, 1989. [C.R. 90.]

Plaintiffs filed a notice of appeal with the Court of Appeals for the Ninth Circuit. The appeal was argued and submitted on July 13, 1990. On January 18, 1991, the court of appeals issued a memorandum decision affirming the district court's entry of summary judgment. [Appendix A to Petition for Writ of Certiorari.]

STATEMENT OF FACTS

Petitioners' statement of the case is incomplete and contains misstatements. This opposition will not set forth all facts but will point out the inaccuracies and complete the statement where inaccurate inferences might be drawn.

A. Approval of Specifications for the LW-3B Ejection System Including the -1 and -9 Sensors

The petitioners excerpt a single word from two of the Navy's approval documents — "released" — to create the inference that the Navy's review process amounted to something less than a knowledgeable approval of the parts and specifications in question. The facts do not support that inference.

In November of 1963, the United States Navy issued a Request for Proposal for the OV-10, a lightweight, armed counterinsurgency aircraft. [C.R. 63, Ex.7, 5:20-25.] The request set forth specifications and

requirements for the aircraft including the ejection seats. [C.R. 63, Ex.7A.] In September 1964, the Navy set forth engineering requirements for the OV-10 including the ejection seat system. [C.R. 63, Ex.7, 6:17-20.]

In response to the Navy's request and specifications, Rockwell issued its Specification (NA64H-895) for the aircraft. Included in this document were specifications for the workings of the LW-3B ejection seat system. [C.R. 63, Ex.7F.]

The specifications set out the details of a dual mode sensor system that used altitude and airspeed to activate the ejection seat system in either a high or low mode. [C.R. 64, Ex.7, 7:18-22.] Upon ejection, the sensor would determine if the airspeed of the aircraft was greater than 235 knots, or if the altitude was above 10,000 feet, and in either event was designed to deploy the parachute in the "high mode." In this mode, the parachute deployed two seconds after the seat left the aircraft. [C.R. 63, Ex. 7, 1:26-2:3.] The two second delay allowed for stabilization of the seat in flight. If the airspeed upon ejection was less than 235 knots, and the altitude was less than 10,000 feet, the parachute was to deploy one-eighth of a second after the seat left the aircraft. Under these circumstances, the system was said to be operating in the "low mode." [C.R. 63, Ex. 7, 2:3-7.]

The Specification described that threaded parts were to be locked: "All threaded parts shall be securely locked by safety wiring, self-locking nuts in conformance with specification with the MIL-N-25027(ASG), cotter pins, *or other approved methods*. . . . The unit may utilize standard instrument locking practices of using epoxy cement to lock and seal threaded parts that are too small to safety wire." (Emphasis added.) [C.R. 63, Ex.7G, 7.]

After testing, the Navy approved the Rockwell Specification in writing and specified that the ejection seat system was to be built in accordance with the Rockwell Specification. On October 15, 1964, the Navy and Rockwell entered into a contract for the production of seven prototype OV-10A aircraft, with the option to purchase additional aircraft. [C.R. 66, Ex. 7V2.][3] This contract incorporated by reference Navy Detail Specification SD-566-1 [C.R. 66, Ex. 7V2, 9] and also allocated funds for a mockup and test demonstration. [C.R. 66, Ex. 7V2, 1].

On January 12, 1965, the Navy approved for the first time the original Control Drawing for the speed sensor designated as HE289-5001. [C.R. 63, Ex. 7, 8:5-8.] This sensor control drawing specified the use of Procurement Specification HC289-5001. [C.R. 63, Ex. 7, 8:8-12.]

In January of 1965, 31 military officers from all four branches of the armed forces inspected a mockup of the OV-10A aircraft seats. [C.R. 63, Ex. 7, 8:13-15.] After the inspection, a mockup report was issued which contained an enclosure entitled "Daily Summary of Aircraft Mock-up Board Decisions." [C.R. 64, Ex. 7L.][4] Therein, the Navy approved or disapproved some 161 different items relating to the OV-10A aircraft.

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[3] Exhibit 7V contains both the contract for the prototypes as well as the supplemental agreement for the production model of the OV-10A. The supplemental agreement is attached to the top of the contract for the prototypes. For citation purposes, PSI refers to the prototype contract as "Ex. 7V2" and the supplemental agreement as "Ex. 7V1."

[4] The referenced document commences several pages into Exhibit L.

The Navy decided that a re-mockup was necessary and scheduled same for March 30 and 31, 1965. [C.R. 63, Ex. 7, 8:15-18.] Thereafter, a re-mockup report was issued by the Navy. That report approved the mockup of the OV-10A and its ejection seat, "[c]ontingent upon Re-mockup Board decisions." [C.R. 64, Ex. 7K.][5]

During the one-year period beginning on April 22, 1965, a series of test firings of the LW3B ejection seat system were conducted. [C.R. 63, Ex. 7, 9:13-14.] In total, 38 seats were test fired, 33 of which involved dynamic tests at various speeds conducted under military supervision at Holloman Air Force Base. [C.R. 63, Ex. 7, 9:14-19.]

On November 6, 1965, the Navy approved Sensor Control Drawing HE289-5001 and Sensor Procurement Specification HC289-5001. [C.R. 63, Ex. 7, 9:23-27.] On June 24, 1966, the Naval Aerospace Recovery Facility, based upon a review of the test results from the Holloman Air Force Base ejection seat tests, recommended that interim qualification be granted to the LW-3B system. [C.R. 63, Ex. 7, 10:14-17; C.R. 65, Ex. 7R.] Full approval was recommended to be withheld pending certain design changes unrelated to the speed sensor. [C.R. 63, Ex. 7, 10:17-19.]

On September 13, 1966, the Naval Air Systems Command ("NASC") granted full qualification to the LW-3B escape system. [C.R. 63, Ex. 7, 11:16-20; C.R. 65, Ex. 7S.] This qualification reflected the Navy's review and approval of the OV-10A/LW-3B mockup and the LW-3B test qualification. [C.R. 63, Ex. 7, 11:21-23.] On October 3, 1966, the NASC approved Revision C of

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[5] The quoted language can be found on page 2 of "Enclosure 1" to the document entitled "Supplementary Aircraft Mockup Board Report" which is located six pages into Exhibit 7K.

Rockwell Sensor Control Drawing HE289-5001 and Revision B of the Sensor Procurement Specification HC289-5001. [C.R. 63, Ex. 7, 11:24-27; C.R. 65, Ex. 7T.]

In 1966, the Navy ordered 223 model OV-10A aircraft from Rockwell. Rockwell contracted with Precision Sensors, Inc. ("PSI") for the manufacture of the speed sensor in accordance with the Navy approved specifications. The parts were procured under PSI part number EDS74DC-1 ("the -1 sensor").

In May 1971, the Navy requested that Rockwell refine the airspeed tolerance specification for the -1 speed sensor. Rockwell prepared Engineering Change Proposal ("ECP") No. 334 and submitted it to the Navy. The ECP was approved by the Navy on April 25, 1972. [C.R. 63, Ex. 7, 19:3-13; C.R. 67, Ex. 7MM.]

Rockwell requested that PSI manufacture the new sensor which bore PSI part No. EDS74DC-9 ("the -9 sensor"). [C.R. 52, 47:1-5.] Beginning in 1972, the -9 sensor was incorporated into the OV-10A aircraft. The -9 sensor used the same external housing and plunger as the -1 sensor. However, the internal mechanism was substantially revised. [C.R. 52, 47:6-19.]

Like the -1 sensor, the -9 sensor was used to actuate high or low mode operation of the ejection seat. The operating parameters were changed as follows: If the airspeed of the aircraft was at or below 200 knots *and* if the altitude was at or below 8,800 feet, the system was intended to operate in the low mode. If the airspeed was above 235 knots *or* the altitude was above 11,200 feet, the system was designed to operate in the high mode. Under all other conditions, the system could function in either high or low mode.

The ejection seat used by Major Guerinot when he died included the -9 sensor.

B. Approval of Loctite as Used in the Sensors

Both the -1 and -9 sensors use an end cap which is threaded onto a plunger. A locking agent is used between the end cap and the plunger to prevent movement of the cap, and to maintain the proper spacing between the end cap and the plunger. [C.R. 52, 49:10-22.] Loctite, an adhesive that hardens in the absence of air, was used by PSI as the locking agent. [C.R. 52, 52:20-21.] The speed sensor specification, approved by the Navy, required that a locking agent be used and that epoxy was a permissible locking agent. [C.R. 52, 48:17-23.] Further, the Navy had approved Loctite as an epoxy. [*See*, Military Specification MIL-S-46163, attached to the record as C.R. 52, 49:28-50:2, 55-68.]

C. Overhaul Manual for the -1 Sensor

When the -1 sensor was being produced, PSI supplied a draft of an overhaul manual for the component. The Navy made minor revisions to the draft and published it as an official Navy document. [C.R. 52, 51:17-20, 70-109, 112-134.] The overhaul manual was used by the Naval Air Rework Facility ("NARF") when overhauling the -1 sensor. After the -9 sensor was manufactured, the Navy declined to purchase an overhaul manual for that component. Because of the different internal construction of the -9 sensor versus the -1 sensor, PSI advised the Navy that it would not be feasible to prepare overhaul instructions for workers based upon revisions to the -1 manual. [C.R. 52, 51:20-25.]

Late in 1981, PSI became aware that the Navy was attempting to overhaul -9 units utilizing the -1 maintenance manual. [C.R. 52, 51:26-28.] PSI wrote to the NARF on January 12, 1982, and advised the Navy, in the strongest possible terms, not to attempt to overhaul the units without proper documentation and recommended that PSI perform all overhauls. PSI further recommended that it conduct a training course for the Navy's overhaul personnel. The Navy declined to follow PSI's recommendations. [C.R. 52, 51:28-52:7.]

D. Post-Accident Investigation

The post-accident investigation revealed that the -9 sensor from the accident ejection seat had been completely disassembled and overhauled at the NARF in the fourth quarter of 1980. [C.R. 52, 175:14-18.] During the overhaul, Loctite sealant was applied to the plunger end cap. [C.R. 52, 176:19-23, 193:3-8.] On disassembly after the accident, it was discovered that some of this Loctite had contaminated the plunger and plunger bore. [C.R. 52, 181:5-182:7.]

According to the Navy's investigation report, this contamination caused a delay in activation of the plunger. This caused the seat to eject in the high mode and consequently the parachute did not deploy before the seat hit the ground.

There was no indication that the sensor plunger was ever tested or activated from the time of overhaul to the date of the accident. [C.R. 52, 186:7-187:3.] If the plunger had been "exercised," the Loctite contaminant would have broken loose. [C.R. 52, 187:4-7.]

It is undisputed that even if the Navy in overhauling the -9 sensor involved in the accident had followed the

most rudimentary of instructions contained in the -1 overhaul manual, the Loctite contamination of the plunger could not have escaped detection. [C.R. 52, 52:8-11.] The only way that Loctite contamination of the plunger could have occurred and remained undetected is if the sensor had not been allowed to cure for the proper time as set forth in the manual. [C.R. 52, 53:20-24.] If the cure time requirements contained in the -1 manual had been properly followed, or if the overhauling personnel had followed the mandates concerning a 24-hour cure time before final testing, or if a plunger torque test had been performed, there could not have been a delay in plunger activation due to Loctite contamination. [C.R. 52, 54:3-9.]

It is also uncontroverted that, prior to the accident in question, PSI had never heard of any incident in which speed sensor had experienced, or was alleged to have experienced, delayed plunger activation due to Loctite contamination. [C.R. 52, 54:10-14.]

Petitioners appear to advance a new allegation in their statement of the case: "Whether the maintenance manual, provided by PSI, gave adequate warning regarding the use of Loctite, remains a contested issue of fact even though both the District Court and the Court of Appeals overlooked this." First, if this is indeed an issue pertinent to this appeal, it is raised here for the first time and thus is improper. *See, Miree v. DeKalb County, GA.*, 433 U.S. 25, 35, 53 L.Ed.2d 557, 97 S.Ct. 2490, 2496 (1977) (where an issue is neither argued nor briefed in the district court or in the court of appeals, the Supreme Court will not consider it). Second, the allegation contains a misstatement of fact; based upon the facts cited above, *the manual used at NARF to overhaul the accident sensor was NOT published by PSI and was in fact published by the Navy.*

REASONS FOR DENYING THE PETITION

I.

THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT THE WRIT OF CERTIORARI

Petitioners have not provided any basis to conclude that there are special and important reasons for this Court to grant the writ of certiorari. The issues raised in this appeal were all dealt with in this Court's recent decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 108 S.Ct. 2510, 101 L.Ed.2d 442, 56 U.S.L.W. 4792 (1988). The petitioners' questions presented can be reduced to one issue: Whether the court of appeals and the district court properly applied the Court's holding in *Boyle*. This does not constitute adequate grounds to grant the writ.

While the considerations listed in Supreme Court Rule 10 are not controlling, it is important that none of the considerations are applicable here. The decision rendered by the court of appeals is not in conflict with the decision of any other court of appeals, nor is there a conflict with a ruling by a state court of last resort. And, petitioners have to concede that even if one assumed for the sake of argument that the court of appeals was incorrect, the decision did not depart from the usual course of judicial proceedings. *See*, Supreme Court Rule 10(a).

Finally, it is worth noting that the decision rendered below was not certified for publication and thus cannot create a conflict between the courts.

II.

THE DECISIONS RENDERED BY THE COURTS BELOW WERE CORRECT

The main thrust of petitioners' argument is that the standards devised by this Court in its opinion in *Boyle v. United Technologies Corp.*, 487 U.S. 500, were misapplied by the court of appeals. It is the position of this respondent that the court correctly applied the *Boyle* standards; that petitioners misconstrue the standards; and that the court of appeals correctly ruled on the other issues raised by petitioners.

A. THE COURT BELOW CORRECTLY APPLIED THE *BOYLE* ANALYSIS

The government contractor's defense is a displacement of state law by federal common law. The *Boyle* case, in an opinion by Justice Scalia, sets forth the standards that must be met before this displacement can occur. The court held that the procurement of equipment by the United States is an area of uniquely federal interest and suits by private parties against government contractors implicate that interest. *Boyle*, 487 U.S. at 504-506. Once it is determined that an area of uniquely federal interest is implicated, state law will be displaced where a "significant conflict" exists between an identifiable federal policy or interest and the operation of state law. 487 U.S. at 507.

Relying on the discretionary function exemption to the Federal Tort Claims Act (28 U.S.C. § 2680(a)) this Court held that state law will be displaced where a judgment against a government contractor would threaten a discretionary function of the Government. *Id.* at

511-512. This Court enunciated a three-prong test to determine under what circumstances a "significant conflict" exists:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States. The first two of these conditions assure that the suit was within the area where the policy of the "discretionary function" would be frustrated — *i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability.

Id. at 512.

The court of appeals correctly applied each part of the *Boyle* analysis. The court first determined that there was a federal interest:

> The present case presents facts similar to those in *Boyle*. If liability is imposed, the result will likely be that

> the contractor will either increase prices in order to insure against future liability, or the contractor will decline future contracts. It seems clear that this directly affects the government's interest in procuring military equipment from outside vendors.

Memorandum opinion of court of appeals, see Petitioners' appendix p. A7.

After determining that there is a federal interest, the next step is for the court to determine whether there is a "significant conflict" between that interest and state law. *Id.* The three prong test, referred to above, is used to make that determination. The court of appeals found that each part of the test was satisfied:

> The next step is to address the *Boyle* three part test. First, did the United States approve reasonably precise specifications? The design must have been a result of continuous "back and forth discussions" between the Navy and the contractor, ensuring that the Government's approval was more than a "rubber stamp." *See, Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.), *cert. denied*, 110 S.Ct. 329 (1989). Additionally the choice of a design which was produced by the contractor rather than the Government can still represent a significant policy decision if the Government approved reasonably precise specifications. *See, Boyle*, 108 S.Ct. at 2518.

> During the development of the ejection system and its sensor, the Navy specified that the system be built in accordance with Rockwell's specification NA64H-895 by issuing documents SD-556-1 and SD-556-2. The system was originally equipped with the -1 sensor, and later with the -9 sensor. There is extensive documentation that the Navy and Rockwell interacted in more than a cursory way in their negotiations. The Navy required specific tests for the ejection system and changes were made as a result of certain failures during the tests. Specifications relating to the speed sensor were approved by the Navy. Additionally, although the Navy did not specifically require the use of loctite as a locking agent, the specifications state that an epoxy may be used as a locking agent, and evidence in the record indicates that the Navy has approved the use of loctite as an epoxy. Further, ample opportunity existed for the Navy to disapprove of its use. Loctite was used for many years in the model OV-10A aircraft and was applied to the aircraft in question by the NARF in 1980. Hence, it seems clear that the Navy approved reasonably precise specifications. (Citation omitted.)

Memorandum opinion, see Petitioners' appendix, pp. A7-8.

The decision of the court of appeals is also supported by the post-*Boyle* cases decided by the lower courts. Those cases have repeatedly emphasized that the first prong of the test "requires only that the government approved *reasonably* precise specifications." (Emphasis in original.) *Smith v. Xerox Corp.*, 866 F.2d 135, 138 (5th Cir. 1989), *reh'g denied (en banc)* 876 F.2d 1154, *cert. denied*, 110 S.Ct. 327 (1989). *Accord, Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989). The courts have correctly ruled that the first criterion "is met by a showing of government approval *of the overall design*. It is *not* necessary that there be 'continuous back and forth discussions . . . regarding the inclusion or exclusion of the specific design deficiency alleged in [the] case.' " (Emphasis added.) *Maguire v. Hughes Aircraft Corp.*, 725 F.Supp. 821, 823-24, (D.N.J. 1989), *aff'd*, 912 F.2d 67 (3d Cir.), *rehearing denied* (No. 89-5970, Oct 5, 1990). *Accord, Harduvel, supra*, 878 F.2d at 1320.

In the present case, the government was not only "intimately involved" in the design of the aircraft as a whole, it was substantially involved in the design and production of the sub-component parts as well. PSI respectfully draws the Court's attention to the factual recitation at the beginning of this brief. It includes a litany of examples of government participation in setting the original specifications, approving the final specifications for the aircraft, mandating intermediate testing of both the aircraft and the ejection seat system, and specifically approving both the -1 and -9 sensors.

Further, there is substantial evidence of government approval of the use of Loctite. Rockwell specification HC289-5001 [C.R. 64, Ex.7J] which all parties concede was "approved" by the Navy, provides as follows:

> *Locking of parts.* — All threaded parts shall be securely locked by safety wiring, self-locking nuts in conformance with MIL-N25027(ASG), cotter pins, *or other approved methods. . . . The unit may utilize standard instrument locking practices of using epoxy cement to lock and seal threaded parts that are too small to safety wire.*

(Emphasis added.)

It is uncontroverted that Loctite is an industrial strength thread locking compound. [See, C.R. 52, 49:27-28.] It is also undisputed that the properties of Loctite are in total compliance with government authored MIL-S46163 which "covers single-component anaerobic compounds suitable for thread-locking and sealing." [C.R. 52, 49:28-50:6.] Loctite was "approved" by the government within the meaning of the *Boyle* test.

The court also found no issue of material fact as to the second prong of the *Boyle* test. There has been no claim that the speed sensor, with Loctite as the locking agent, deviates from the specification. See, Memorandum opinion, Petitioners' appendix, p. A8.

Finally, the court found no evidence that PSI or Rockwell knew of any safety risks regarding the use of Loctite. See, Memorandum opinion of court of appeals, Petitioners' appendix, p. A9. Thus, the third part of the test was fulfilled.

The court of appeals followed the *Boyle* analysis and correctly applied it.

B. PETITIONERS' ARGUMENT MISCONSTRUES THE *BOYLE* ANALYSIS

Petitioners argue that before applying the three part *Boyle* test, that there must be a preliminary finding of a "significant conflict" between a federal interest and state law. See, Petition for Writ of Certiorari, pp. 7-12.

As discussed above, the Supreme Court in *Boyle* set forth the test for application of the military contractor defense as follows: "Liability for design defects *in military equipment cannot be imposed*, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." (Emphasis added.) 487 U.S. at 512.

Although the emphasized language leaves absolutely no doubt that the military contractor defense is applicable whenever the above-cited three-part test is satisfied, petitioners argue that the high court did not mean what it said. Petitioners argue that in actuality the test is a *four* part test, with the first part requiring an affirmative demonstration of a "significant conflict" between federal interests and state law.

Petitioners argue that if there is a theory of recovery not inconsistent with the specifications approved by the military then that constitutes a state interest that is not inconsistent with the federal interest. In other words, any time that a plaintiff can devise a design alternative that would not have been ruled out by the design specifications approved by the military then there is no conflict with federal interests and the military contractor's defense cannot apply. This cannot be this Court's intention.

PSI does not deny that a "significant conflict" is necessary before the military contractor defense can be applied. The Court obviously had this in mind when articulating its test. The two theoretical alternatives supported by a fair reading of the case are that the significant conflict is inherent when dealing with the procurement of military equipment or that the three-part test itself is a test for the significant conflict. Based on either interpretation, the "significant conflict" standard has been met in this case.

C. PLAINTIFF'S OTHER ISSUES WERE RESOLVED CORRECTLY BY THE COURT OF APPEALS

1. The Overhaul Manual Was Not PSI's "Product" and Therefore, PSI Cannot Be Liable for Alleged Defects in the Manual

From the heading of petitioners' fourth argument and from Question Presented No. 4, it is difficult to concern the thrust of petitioners' argument. However, it appears that petitioners are arguing that PSI should have been held responsible for alleged defects in the -9 maintenance manual which supposedly led to an excessive amount of Loctite being placed on the sensor during overhaul.

There is one glaring error with respect to petitioners' argument. The particular manual in question was put together *by the Navy, not PSI.* While PSI did issue a draft manual for the -1 sensor, which the Navy adopted after making minor changes, *it never published a manual for the -9 sensor.* Indeed, it is uncontroverted that when PSI became aware that the Navy was attempting to

modify its -1 manual to overhaul -9 sensors, it warned the Navy not to use the manual in such a manner.

Further, assuming, *arguendo*, that PSI can be held responsible for the contents of the -1 manual, petitioners' theory must still fail as the manual was not defective. The only evidence on point is the uncontradicted declaration of John L. Button. Mr. Button stated that "[e]ven if the Navy in overhauling this particular -9 sensor had followed the most rudimentary of the instructions contained in the -1 overhaul manual, the Loctite contamination of the plunger could not have escaped detection." [C.R. 52, 52:8-11.]

Finally, the government contractor's defense applies to the manual. There is no question that the Navy approved the -1 manual as it expressly adopted the manual as its own. [See, C.R. 52, 112.] The approval was more than a mere "rubber stamp" as the manual actually published by the Navy reveals several small changes made throughout the document by the Navy. [Compare C.R. 52, 70-109 to C.R. 52, 112-134.] In its adoption, the Navy also proves that the manual conformed to its specifications.

It is equally obvious that the supplier warned the United States about the dangers and the use of the equipment known to the supplier. When PSI discovered that the Navy intended to use the -1 manual to overhaul -9 sensors, it advised the Navy to cease this practice. PSI also had no knowledge of any prior incident in which a sensor experienced, or was alleged to have experienced, delayed plunger activation due to Loctite contamination.

2. The Court of Appeals Was Correct That Two of Plaintiff's Theories of Liability Had Been Abandoned

The district court and the court of appeals also determined that there was no genuine triable issue of material fact regarding two theories of liability that were dismissed as abandoned. Despite this, in Section 5 of their brief and Question Presented No. 5, petitioners still assert that two theories are viable. Petitioners assert that even after the close of discovery, and the initiation of summary judgment motions, the court cannot rule that theories have been abandoned despite the total lack of evidence supporting those theories. If petitioners' argument were correct no court could ever grant a summary judgment or a summary adjudication of issues prior to trial.

CONCLUSION

For the reasons stated above, we respectfully request that this Court deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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